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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK GABRIEL,

Defendant and Appellant.

A142871

(Mendocino County Super. Ct.
No. SCUK-CRCR-12-70669)

Mark Gabriel was convicted by jury of marijuana cultivation (Health & Saf. Code, § 11358) and firearms possession (a rifle and two handguns) by a felon (Pen. Code, § 29800, subd. (a)(1)). With regard to the marijuana cultivation offense, the trial court found true an enhancement allegation that Gabriel was armed with the same specifically identified weapons (*id.*, § 12022, subd. (a)(1)). Gabriel was sentenced to terms of imprisonment for both firearms possession and the arming enhancement. The issue presented here is narrow: Gabriel argues that Penal Code section 654 prohibits his punishment for both the arming enhancement and unlawful possession of the same weapons because each arose from the same indivisible course of conduct. We agree.

I. BACKGROUND

Mendocino County Sheriff's Department Sergeant Bruce Smith testified at trial that, on October 17, 2012, he executed a search warrant on property located at 1101 North Road in Laytonville. The road leading to the property had three locked gates. The property contained a modular home, shop, two trailers, and marijuana gardens with 302 marijuana plants that were connected by electrical and water lines. About

200 pounds of marijuana were hanging to dry inside the home and shop. Also inside the home were paper bags containing another 400 pounds of partially processed marijuana and 10 pounds of fully processed marijuana. Officers also found oven bags and a digital gram scale in the home.

The home contained three “sleeping areas,” and police found Gabriel, Adam Aucella, and Brent Guiliano on the scene. In the home, officers found a rifle, semiautomatic pistol, and revolver—all loaded and lying in plain view. Mail addressed to Gabriel was found in the home. Inside Gabriel’s vehicle, which was parked outside the home, police found packages of plant stakes; a September 25, 2012 receipt for two pillows, two sleeping bags, and a 12-volt pump; October 10 and 11, 2012 receipts for extension cords and a dehumidifier; a water bill in an unpostmarked envelope addressed to Mike Hartley with 1101 North Road listed as the service address and a private mailbox in San Francisco listed as the mailing address; a money transfer receipt for Gabriel; and a 2012–2013 medical marijuana recommendation for Gabriel. Officers found pillows, sleeping bags, an air mattress and two dehumidifiers in the home and new extension cords on the property. In Gabriel’s wallet, the police found \$1,200 in cash and Gabriel’s passport.

Smith asked Gabriel how he got to the residence, and Gabriel “initially said he was kind of stuck there, he had been there for about a month. He never did explain how he got there. . . . [¶] . . . [¶] . . . He wasn’t real sure [how long he had been there]. He kept changing his story.” Gabriel said he slept by the cots in the home and did “whatever needed to be done” on the property. He had marijuana debris on the left shoulder or lower arm area of his shirt. Gabriel admitted he was aware of the rifle on the premises but not of the other two guns. When confronted with the fact he had been caught at a Boston airport in 2010 with \$300,000 in cash, Gabriel claimed the money had been planted on him. Gabriel acknowledged that he had a 2007 felony conviction.

Gabriel testified he had been to the property off and on for about a month but always stayed at a Laytonville hotel while in the area. He was growing 15 marijuana plants on the property to supply his personal consumption needs. His garden was fenced

off from other marijuana growing on the property, and a notice of his medical marijuana recommendation was posted by his garden. Hartley, who controlled access to the property, gave Gabriel permission to grow the marijuana there and showed him a binder of medical marijuana recommendations. On the morning of Gabriel's arrest, Hartley had let Gabriel, Aucella and Guiliano onto the property then left, locking the gates behind him. Gabriel worked only on his own garden, although he bought supplies for Hartley as a favor and let Hartley use his car to get supplies. Gabriel and Harley maintained private mailboxes at the same location in San Francisco, but Gabriel did not have access to Hartley's mailbox. Gabriel was a "trust fund baby" and travelled extensively abroad. Gabriel denied telling Smith that he had been stuck on the property for about a month, had stayed at the modular home, or was aware of the rifle.

Smith testified on rebuttal that Gabriel never said a medical marijuana notice was posted in his garden, and Smith never saw such a notice. Gabriel also never said his plants were limited to one small area. In any event, the 15 plants Gabriel identified as his would yield about 75 pounds of bud marijuana.

As noted *ante*, a jury found Gabriel guilty of marijuana cultivation and firearms possession and, on submission, the trial court found the arming allegation to be true. On June 2, 2014, Gabriel entered pleas of no contest in three other felony matters: possession of money in excess of \$100,000 obtained as the result of the unlawful sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance (Health & Saf. Code, § 11370.6, subd. (a); case No. 13-74765); willfully failing to appear while on felony bail (Pen. Code, § 1320, subd. (b); case No. 13-74781); and transportation of marijuana (Health & Saf. Code, § 11360, subd. (a); case No. 13-75280). Gabriel was found to be in violation of his probation on another matter, and two additional cases were dismissed. The pleas were "open," with no promise as to the sentences to be imposed. It was agreed that all matters, including his jury convictions in the instant case, would be sentenced at the same time, and that the jury convictions would not be the principal terms.

On June 27, 2014, Gabriel appeared for sentencing on all matters. His total sentence was nine years eight months, with the Health and Safety Code section 11370.6, subdivision (a) violation in case No. 13-74765 as the base term. For the instant case, the court imposed consecutive sentences of eight months for the Penal Code section 29800, subdivision (a)(1) firearms offense (1/3 of the midterm), eight months for the Health and Safety Code section 11358 cultivation offense (1/3 of the midterm), plus four additional months for the Penal Code section 12022, subdivision (a)(1) arming enhancement.

II. DISCUSSION

Gabriel argues the trial court should have stayed punishment for firearm possession under Penal Code section 654 (hereafter section 654), which provides in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) “The ‘act’ necessary to invoke section 654 need not be an act in the ordinary sense that it is a separate, identifiable, physical incident, but may be ‘a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.’” (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) Although not raised in the trial court, Gabriel’s argument suggests his sentence was unauthorized by law—a legal question we may decide for the first time on appeal. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) We agree that the sentence violated section 654.

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably

deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The sentencing court here made no express findings with respect to the application of section 654. This is not surprising given that the issue was not raised or argued at sentencing. We therefore must consider whether the implicit findings underlying the court’s imposition of punishment for both convictions are supported by substantial evidence. (See *Jones*, at p. 1147.)

“ ‘Whether a violation of [former Penal Code] section 12021 [(current Pen. Code, § 29800)], forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’ ” (*People v. Bradford, supra*, 17 Cal.3d at p. 22.)

The People rely on a series of cases holding that “multiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense’ . . . [¶] . . . [¶] On the other hand, it is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent. . . . [¶] . . . [S]ection 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*People v. Jones, supra*, 103 Cal.App.4th at pp. 1144–1145 [discussing *People v. Bradford, supra*, 17 Cal.3d 8, *People v. Venegas* (1970) 10 Cal.App.3d 814, and *People v. Ratcliff* (1990) 223 Cal.App.3d 1401]; see *People v. Jones* (2012) 54 Cal.4th 350, 358, fn. 3 [noting that its clarification of § 654 law does not cast doubt on the holding of *People v. Jones, supra*, 103 Cal.App.4th at pp. 1144–1146].) These cases, however, involve firearm possession and a crime that is committed at a discrete point in time: shootings in *Jones, Bradford* and *Venegas* and an armed robbery in *Ratcliff*. (See

Jones, supra, 103 Cal.App.4th at pp. 1141–1142; *Bradford*, at p. 13; *Venegas*, at pp. 818–819, 821; *Ratcliff*, at pp. 1404–1405, 1407–1408.) Here, the underlying crime is cultivation of marijuana, a crime that is committed over an extended period of time. Therefore, we conclude the rule summarized in *Jones, supra*, 103 Cal.App.4th 1139 is not directly applicable to this case.

Gabriel’s marijuana cultivation marijuana and firearms possession both took place over an extended period of time, and there is no evidence that he committed one crime for a purpose different from his purpose in committing the other. There was no evidence Gabriel personally procured the firearms and brought them to the site or otherwise controlled or possessed the firearms in a context other than marijuana cultivation. The marijuana cultivation was ongoing at the time of his arrest, so there was also no evidence that he possessed the firearms following the cultivation. Thus, no substantial evidence exists on which the trial court could have found that Gabriel had a different purpose or intent when he committed the two crimes and that his sentence for one of the crimes should have been stayed. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 645–646 [separate punishment prohibited for possession of a firearm while a felon and possession of drugs while armed where trial court expressly found the crimes involved the same act and intent]; *People v. Jones, supra*, 54 Cal.4th at p. 357 [impliedly approving of § 654 holding in *Williams*].)

We are unpersuaded by the People’s argument that “[g]iven the length of time it takes to cultivate marijuana and the evidence of appellant’s residency at the property, it is a reasonable inference that appellant possessed these three guns independently from and for purposes other than just cultivating the marijuana.” We have some difficulty understanding the argument. The fact that it may take an extended period of time to raise and process a crop of marijuana does not lead to an inference that the grower must have had an independent purpose in keeping firearms at the location of the marijuana operation. In fact, the opposite could well be true. The People specifically suggest that “[g]iven the quantities of marijuana found on the premises it is reasonable to conclude that [Gabriel] also possessed the weapons to facilitate the sale and transport of

marijuana.” The trial court made no such express finding, and nothing in the record before us renders the People’s thesis anything other than speculation. The People note that the trial court’s implied findings are entitled to deference, but those findings must be supported by substantial evidence in the record.

The usual remedy for a section 654 violation is to impose sentence on the offense that, along with all applicable enhancements, carries the longer potential term of imprisonment. (*People v. Kramer* (2002) 29 Cal.4th 720, 722–725.) Gabriel argues that *Kramer* consequently requires that the eight-month sentence imposed for unlawful firearm possession be stayed. *Kramer*, however, applied that rule in the context of “two or more offenses for which section 654 prohibits multiple punishment.” (*Id.* at p. 722, italics added.) There, the defendant was convicted of both discharging a firearm at an occupied vehicle and assault with a firearm (Pen. Code, §§ 246, 245, subd. (a)(2)). As to the assault charge only, a sentence-enhancing allegation was found true that the defendant personally used a firearm (*id.*, § 12022.5, subd. (a)). (*Kramer*, at p. 722.) The reviewing court remanded for sentencing on the assault charge, with the use enhancement, holding that the purpose and legislative history of amendments to section 654 supported the conclusion that the trial court should impose sentence on the offense that provided for the longest term, including any sentencing enhancements. (*Kramer*, at pp. 723–725.)

In this case, in contrast, punishment for both marijuana cultivation and unlawful firearm possession is not prohibited. Only imposition of the arming enhancement in addition to sentencing on the Penal Code section 29800, subdivision (a)(1) firearms offense is barred. “ ‘[T]he purpose of section 654 “is to insure that a defendant’s punishment will be commensurate with his culpability.” [Citations.] A person who commits two crimes is not less culpable than if that person had committed only one of those two crimes. Allowing a reduced sentence because of increased criminal behavior is not reasonable, and does not make punishment commensurate with culpability.’ ” (*People v. Kramer, supra*, 29 Cal.4th at p. 723.) In amending section 654 to permit “ ‘the longest available sentence,’ ” the Legislature was “concerned with the actual overall

sentence the defendant receives, not any portion of that sentence in isolation.” (*Id.* at p. 724, italics omitted.) The longest *available* sentence under these circumstance consists of the consecutive terms imposed for the two jury convictions, without the arming enhancement on the marijuana cultivation count. We therefore order that portion of the sentence imposing the Penal Code section 12022, subdivision (a)(1) enhancement be stayed pursuant to section 654.

III. DISPOSITION

The consecutive four-month term of imprisonment imposed under Penal Code section 12022, subdivision (a)(1), is ordered stayed. The clerk of the Mendocino Superior Court is directed to prepare an amended abstract of judgment reflecting the stay and a total term of imprisonment of nine years and four months, and to forward a copy of that abstract to the California Department of Corrections and Rehabilitation.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

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